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No. 99-1125

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, INC.,
Petitioner,
v.
REIMER & KOGER ASSOCIATES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS KPMG PEAT MARWICK LLP AND ROBERT W.L. SPENCE

WILLIAM F. LLOYD
JEFFREY R. TONE
NANCY A. TEMPLE
HILLE R. SHEPPARD
SIDLEY & AUSTIN
Bank One Plaza
10 South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

DONALD W. ROSE
Associate General Counsel
KPMG LLP
280 Park Avenue
New York, New York 10017
(212) 909-5412

CARTER G. PHILLIPS *
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Respondents KPMG Peat Marwick LLP and Robert W.L. Spence

* Counsel of Record

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WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the court of appeals properly held that the district court did not abuse its discretion in denying petitioner relief from judgment under Federal Rule of Civil Procedure 60(b)(6) where the district court based its holding on several alternative grounds, including findings (i) that there were no "extraordinary circumstances" warranting such relief and (ii) that petitioner had "long ago abandoned any persuasive claim to equity."

LIST OF PARTIES AND AFFILIATES

Petitioner neither provided a list of parties in accordance with Supreme Court Rule 14 nor included all parties in its caption. The following parties are respondents: Reimer & Koger Associates, Inc.; Ronald Reimer; Kenneth H. Koger; Clifford W. Shinski; Brent Messick; Robert Crew; Sherman Dreiseszun; I.I. Ozar; Frank Sebree; Gage & Tucker; Peat, Marwick, Mitchell & Co.; KPMG Peat Marwick LLP; Robert W.L. Spence; Thomas S. Morgan and Marilyn J. Morgan, co-executors of the estate of Frank S. Morgan; C. Patrick McLarney, substituted for Shook, Hardy & Bacon; Blackwell, Sanders, Peper, Martin, L.L.P., formerly known as Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.; and William H. Sanders, Sr.

In addition, Michael Russell was a defendant in the district court and the Resolution Trust Corporation was a third-party defendant in the district court, as well as a limited intervenor in that court.

Pursuant to Supreme Court Rule 29.6, respondent KPMG Peat Marwick LLP (now known as KPMG LLP) states that it is a limited liability partnership with no parent companies or publicly-held subsidiaries, and that respondent Peat, Marwick, Mitchell & Co. was its predecessor. Respondent Robert W.L. Spence is an individual.

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BRIEF IN OPPOSITION OF RESPONDENTS KPMG PEAT MARWICK LLP AND ROBERT W.L. SPENCE

KPMG Peat Marwick LLP and Robert W.L. Spence (collectively, "KPMG") respectfully submit this brief in opposition to the petition for a writ of certiorari filed by the Kansas Public Employees Retirement System, Inc. ("KPERS").

DECISIONS BELOW

The decision below was the tenth decision by the Eighth Circuit arising out of this litigation, and this is petitioner's fifth petition for certiorari. *KPERS v. Reimer & Koger Assocs., Inc.*, 4 F.3d 614 (8th Cir. 1993) ("*KPERS I*"), *cert. denied*, 511 U.S. 1126 (1994); *Boatmen's First Nat'l Bank v. KPERS*, 57 F.3d 638 (8th Cir. 1995); *KPERS v.*

Reimer & Koger Assocs., Inc., 60 F.3d 1304 (8th Cir. 1995) ("*KPERS II*"); *KPERS v. Reimer & Koger Assocs., Inc.*, 61 F.3d 608 (8th Cir. 1995) ("*KPERS III*"), *cert. denied*, 516 U.S. 1114 (1996); *KPERS v. Reimer & Koger Assocs., Inc.*, 77 F.3d 1063 (8th Cir.) ("*KPERS IV*"), *cert. denied*, 519 U.S. 948 (1996); *In re KPERS*, 85 F.3d 1353 (8th Cir. 1996) ("*KPERS V*"); *KPERS v. Blackwell, Sanders, Matheny, Weary & Lombardi, L.C.*, 114 F.3d 679 (8th Cir. 1997) ("*KPERS VI*"), *cert. denied*, 522 U.S. 1068 (1998); *KPERS v. Russell*, 140 F.3d 748 (8th Cir. 1998) ("*KPERS VII*"); *KPERS v. Reimer & Koger Assocs., Inc.*, 165 F.3d 627 (8th Cir. 1999) ("*KPERS VIII*"); *KPERS v. Reimer & Koger Assocs., Inc.*, 194 F.3d 922 (8th Cir. 1999) ("*KPERS IX*") (Pet. App. 1a-6a). The district court's decision below is unreported. (Appendix to the Opposition, pp. 1a-6a ("Opp. App.").)

INTRODUCTION AND STATEMENT OF THE CASE

This is the fifth petition for certiorari that petitioner has filed in this case, which has resulted in ten published opinions from the United States Court of Appeals for the Eighth Circuit. Petitioner now seeks this Court's review of the Eighth Circuit's affirmance of the district court's discretionary decision not to revive this litigation under Federal Rule of Civil Procedure 60(b)(6). The petition, which largely rehashes arguments made in earlier appeals and petitions for certiorari, confirms that petitioner's latest efforts below and in this Court are in fact simply an attempt to revisit prior unfavorable rulings under the guise of Rule 60(b)(6). In any event, the lower courts' determination that the equities favor finality, given their long history with this case, is entitled to great deference. More importantly, the petition presents no question worthy of this Court's attention: the question presented rests on

a misreading of the opinions below, the purported "circuit split" is illusory only, and the unique facts of this case make it unsuitable for review. This litigation should be permitted finally to come to an end by denial of certiorari.

Petitioner's statement of the case is inaccurate in many respects. Nevertheless, for present purposes, only five corrections need be made.

1. Petitioner grossly mischaracterizes its role in this litigation, portraying itself as an innocent victim working always in good faith to obtain a definitive ruling on the applicable statute of limitations from the Kansas state courts. In reality, as the Eighth Circuit has found, petitioner engaged in numerous abusive and manipulative litigation tactics. Among other things, petitioner obtained a highly irregular *ex parte* severance order from the Kansas state trial judge to whom this case was originally assigned in an attempt to defeat removal jurisdiction, an order that the Eighth Circuit held was unconstitutional; this Court denied review. *KPERS I*, 4 F.3d at 619. As another example, petitioner sought disqualification of District Judge D. Brook Bartlett on spurious grounds in order to delay a decision on motions for summary judgment, which prompted the Eighth Circuit to comment: "[o]ur review of [petitioner's] pattern of conduct leads us to conclude that the defendants' allegation that [petitioner's] recusal motion and this [mandamus] petition were filed for tactical and strategic reasons, as opposed to concern about the impartiality of the trial judge, is correct." *KPERS V*, 85 F.3d at 1360. Petitioner has also had attorneys' fees assessed against it under 28 U.S.C. § 1927, *KPERS VIII*, 165 F.3d at 629, and has been sanctioned under Federal Rule of Appellate Procedure 38 for taking frivolous appeals (Eighth Circuit Order Dated

October 4, 1999, in Case No. 97-2811, and Eighth Circuit Order Dated November 8, 1999, in Case No. 97-1880).

2. Petitioner repeatedly complains that this case is not properly in federal court. To the contrary, the Resolution Trust Corporation ("RTC")—*not* respondents—removed the case to federal court under the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), 12 U.S.C. § 1441a(*l*)(3), and the Eighth Circuit, in a ruling not challenged here, affirmed the initial removal. *KPERS I*, 4 F.3d at 621. After the third-party claims against the RTC were dismissed,[1] the district court exercised its discretion to retain the case based on the factors of judicial economy[2] and fairness to the parties[3] set forth in 28 U.S.C. § 1367. The Eighth Cir-

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[1] Petitioner's representation that, after the claims against it were dismissed, the RTC had "informed the district court that it had no further interest in the case remaining in federal court" (Pet. 6 n.4) is grossly misleading. The RTC was continually involved in this case to ensure that the claims being asserted by petitioner against certain defendants were not derivative claims that rightly belonged to the RTC as receiver of a failed savings and loan. In fact, the RTC itself moved to intervene in the case long before it was served with the third-party complaint. After the district court dismissed the third-party complaint against the RTC, it granted the RTC's motion for status as a limited intervenor. Thus, the RTC remained involved in the case after the dismissal of the third-party complaint against it, and it even attended depositions and hearings to protect its interests.

[2] As of June 30, 1994, *before* the Eighth Circuit's decision in *KPERS III* that engendered the majority of petitioner's abusive litigation tactics designed to delay or prevent implementation of that decision, the district court "had already spent more time on this case than any other case but one in 10 years." *KPERS V*, 85 F.3d at 1355.

[3] The district court's fairness concerns were based on the fact that all Kansas judges are beneficiaries of petitioner and on the unusual circumstances surrounding the state court judge's after-hours, *ex parte* severence of the claim against the RTC:

cuit again affirmed, holding that once the RTC becomes a party to a case, under 12 U.S.C. § 1441a(*l*)(1), "the entire action is 'deemed to arise under the laws of the United States' and is within the original jurisdiction of the district court." *KPERS IV*, 77 F.3d at 1067. That ruling, from which this Court denied certiorari, is not challenged here.

3. Petitioner's characterization of this action as "civil fraud claims . . . pursued by Kansas . . . in lieu of a criminal prosecution" (Pet. 21) is false. KPMG has never been charged with an intentional tort, but only with negligence. There is no basis whatsoever for Kansas to bring any criminal action against KPMG.

4. The district court did not deny petitioner relief from the final *KPERS VI* judgment based solely on petitioner's "unclean hands," as petitioner would have this Court believe. Rather, the district court first held that it did not have power to grant relief under Rule 60(b)(6). The court reasoned that the real basis for petitioner's motion was the Kansas Supreme Court's decision changing the applicable statute of limitations, and that petitioner had been denied relief based on that decision both

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My concern about fairness focuses on the appearances generated by the obvious benefit to any member of KPERS, including the Kansas judges, who could receive increased benefits if KPERS is successful in this case. Furthermore, as I stated at the Ju[ne] 30, 1994, hearing, the Shawnee County District judge's participation in KPERS' ex parte efforts to thwart the RTC's removal rights "creates a reasonable concern about the manner in which the parties to this case might be treated if [the case] is returned to . . . Shawnee County." Tr. 199. All of the parties in this case deserve a forum for the resolution of their dispute free of these influences.

(KPMG's *KPERS IV* Appendix in the Eighth Circuit, p. 39.) The district court's fairness concerns were not unfounded: the Kansas state trial judge was subsequently disqualified for personal bias from all litigation involving petitioner.

by the Eighth Circuit (which denied petitioner's motion for leave to file a second petition for rehearing in *KPERS VI*) and by this Court (which denied petitioner's petition for certiorari). (Opp. App. 4a (citing *Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456 (8th Cir. 1990), and *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 962 F.2d 1528, 1534 (10th Cir.), *cert. denied*, 506 U.S. 956 (1992)).) Petitioner does not challenge that holding by the district court here.

The district court went on to hold that even if it did have power to grant Rule 60(b)(6) relief, petitioner was not entitled to such relief under the law. (Opp. App. 5a.) The court explained that petitioner had "not satisfied its burden under Rule 60(b)(6)" because, even though the statute of limitations applied in *KPERS VII* (dealing solely with defendant Russell) was different from that applied in *KPERS VI* (affirming summary judgment to respondents) because of the intervening Kansas Supreme Court decision, "a change in or clarification of state law after a final decision in federal court is not an exceptional circumstance allowing the extraordinary relief of reopening the final *KPERS VI* judgment." (*Id.*)

The district court then discussed equitable considerations in conclusion, stating that "[o]nly passing familiarity with the history of this case in this court and in the appellate courts would convince any fair-minded person that the time has come for this court to echo the Eighth Circuit Court of Appeals—this case is over." (*Id.*) The court further added, "[t]o the extent, if at all, that equitable considerations have an effect on Rule 60(b) relief, [petitioner] long ago abandoned any persuasive claim to equity." (*Id.* at 5a-6a (citing *KPERS IV*, 77 F.3d at 1066 (holding that petitioner's wholly duplicative state court actions were an attempt to subvert federal removal jurisdiction), and *KPERS V*, 85 F.3d at 1359-60 (man-

damus petition that the Eighth Circuit found was filed for "tactical and strategic reasons, as opposed to concern about the impartiality of the trial judge")).)

5. The Eighth Circuit made no finding that "existing federal appellate precedent, applied in light of five extraordinary factors present in this case, required granting the relief requested." (Pet. 16.) To the contrary, the Eighth Circuit recognized only that the factors petitioner had identified in support of its Rule 60(b)(6) motion had "been considered relevant" in certain other cases, but held that they did "not compel the conclusion that the district court abused its discretion in denying [petitioner's] motion." (Pet. App. 5a.) Nor did the Eighth Circuit ignore the traditional balancing between finality, on the one hand, and the interest in justice, on the other. The Eighth Circuit recognized that "[s]ociety's powerful countervailing interest in the finality of judgments simply requires that each case have an end" and noted that petitioner had engaged in actions that were "objectively unreasonable and done in bad faith" and that attorneys' fees had been assessed against petitioner "for unreasonably and vexatiously multiplying proceedings." (*Id.* at 5a-6a.)

REASONS FOR DENYING THE PETITION

This petition presents no question worthy of this Court's attention. The question presented rests on erroneous factual and legal premises which, when corrected, make clear that petitioner seeks review of a decision properly decided under an abuse of discretion standard and applying well-settled legal principles to a unique set of facts. The purported "circuit split" is wholly illusory. Moreover, the highly unusual facts and procedural posture of this case make it particularly inappropriate for establishing precedent. The petition should be denied.

The factual and legal premises of the question presented—that petitioner's "unclean hands" result solely from petitioner's legitimate efforts to obtain a definitive ruling on the statute of limitations from the Kansas state courts and that petitioner would have been "entitled" to relief under Rule 60(b)(6) if its abusive and manipulative litigating tactics were set to one side—are both false. Petitioner's "unclean hands" result from its *illegitimate* litigating tactics, several of which petitioner does not mention in its petition. *See supra*, pp. 3-4. And the district court specifically found that petitioner was not "entitled" to Rule 60(b)(6) relief under the law without regard to the equities. (Opp. App. 5a.) Indeed, the district court found that it did not even have power to entertain petitioner's Rule 60(b)(6) motion. (*Id.* at 4a.)

The Eighth Circuit did not conclude that absent petitioner's "unclean hands" it would have been entitled to relief. On the contrary, the Eighth Circuit noted only that the factors cited by petitioner relating to Rule 60(b)(6) had been considered "relevant" in other cases but explicitly held that such factors *in this case* did *not* "compel the conclusion" that the district court had abused its discretion. (Pet. App. 5a.) Thus, petitioner merely seeks review of the Eighth Circuit's straightforward application of the abuse of discretion standard to the particular set of facts present here. That fact-bound question, involving no important or unsettled issues of law, does not warrant this Court's attention.[4]

Furthermore, petitioner's "unclean hands" are clearly relevant to the Rule 60(b)(6) inquiry. Petitioner's assertion that the Eighth Circuit's opinion "conflicts with nu-

[4] That conclusion is further dictated by the fact that the district court's decision is based on an alternative ground—that the district court lacked power to grant Rule 60(b)(6) relief—that the Eighth Circuit did not need to reach.

merous decisions of this Court and of other federal circuit courts" (Pet. 17) does not withstand scrutiny. Petitioner cites *no* case holding that courts must ignore a movant's "unclean hands" in ruling on a Rule 60(b)(6) motion. To the contrary, it is clearly established that relief from judgment under Rule 60(b)(6) "is equitable in nature" and that, in exercising its discretion under Rule 60(b)(6), "a court may always consider whether the moving party has acted equitably." 12 James W. Moore, *Moore's Federal Practice* ¶ 60.22[5] (3d ed. 1998); *see also* 11 Charles A. Wright et al., *Federal Practice and Procedure* § 2857 (1995) ("Equitable principles may be taken into account by a court in the exercise of its discretion under Rule 60(b)."). Petitioner's suggestion that the only equities that may be considered involve balancing finality against obtaining a purportedly "just" result is without support. (Pet. 17-18.) Petitioner cites no decision holding that a movant's bad-faith litigating tactics which manifestly increase the costs to both the federal courts and to the parties are irrelevant to whether justice would be accomplished in granting Rule 60(b)(6) relief. In fact, numerous decisions deny Rule 60(b)(6) relief on equitable grounds relating to the movant's conduct. *E.g., National Org. for Women v. Operation Rescue*, 47 F.3d 667, 669 (4th Cir. 1995) (*per curiam*) (affirming denial of Rule 60(b)(6) relief where district court found that movants' dilatory tactics gave them " 'unclean hands,' making them undeserving of the benefits of equitable relief"); *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 681 (11th Cir. 1984) (holding that "this case is replete with inexcusable delay and numerous unjustified violations of the court's orders, which fully support the court's denial of relief under Rule 60(b)(6)"); *cf. Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (*per curiam*) (a GVR order is inappropriate if it "is part of an unfair or manipulative litigation strategy").

This Court recently recognized that "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." *Agostini v. Felton*, 521 U.S. 203, 239 (1997). Petitioner thus seeks this Court's "guidance" concerning a legal scenario that rarely occurs. (Pet. 17.) In any event, the petition itself makes clear that no such "guidance" is necessary; the lower federal courts routinely balance the general interest in finality and the specific interest in achieving justice in considering whether to grant Rule 60(b)(6) relief. (Pet. 17-18 (citing cases).) Petitioner's unhappiness with the way the lower courts struck that balance in this case does not warrant this Court's review.

In addition, the highly unusual history and procedural posture of this case make it a particularly inappropriate case for announcing "guidance" on how Rule 60(b)(6) should be applied. First, the RTC's involvement in this case is critical, because that involvement converted this case into a federal-question case under 12 U.S.C. § 1441a(*l*)(1). Such circumstances are unlikely ever to recur, given that the RTC ceased to exist as of December 1995. *See* 12 U.S.C. § 1441a(m). Second, this case has had so many interlocutory appeals that the Eighth Circuit was unusually familiar with the facts, the law, and the parties' litigating tactics when it affirmed the district court's decision. Third, petitioner's bad-faith litigating tactics are unlikely to be precisely replicated. For these reasons, it would be difficult in this case to craft a useful rule of general applicability, and any rule created here would necessarily have little precedential value.

Finally, petitioner's suggestion that the denial of its request for relief is "unjust" is wrong. KPMG and its co-defendants have endured years of abusive litigation tactics, without which the final judgments in this case

would have been entered and affirmed years ago, long before the Kansas Supreme Court's decision. Moreover, finality is an important part of justice. *See Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931) ("Public policy dictates that there be an end of litigation . . . ."); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628 (7th Cir. 1997) ("the need for the finality of judgments is an overarching concern"). Any assessment of finality necessarily involves consideration of the course of the prior litigation, including the expenses of the courts and of the parties (especially where such expenses were increased due to abusive and strategic litigation tactics, as in this case). *See Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 831 (7th Cir. 1985) (in weighing Rule 60(b) relief, district court must consider the costs to the parties and to society).[5] Finally, petitioner could not prevail against KPMG in any event, because KPMG is entitled to summary judgment on the alternative ground that, as the undisputed facts that the Eighth Circuit has already affirmed show, nothing KPMG did caused petitioner to suffer any losses.[6] There is nothing "unjust" about denying petitioner's Rule 60(b)(6) motion.

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[5] As Chief Justice Rehnquist has observed in the context of GVR orders, "requiring the Court of Appeals to delve into the facts and law of [a] case again, months after it denied rehearing, is not without cost. The typical active judge of the Court of Appeals for the Eleventh Circuit participates in somewhere between 150 and 200 panel decisions each year. For us to require a busy court to once more revisit the merits of this state law dispute gives these petitioners more of the time and resources of the federal judicial system than they deserve." *Thomas v. American Home Prods., Inc.*, 117 S. Ct. 282, 285 (1996) (Rehnquist, C.J., dissenting from GVR order). This observation is particularly apposite here, where the Eighth Circuit has already considered the case ten times.

[6] The very same facts that the district court found were undisputed, and that caused petitioner's claims to be barred under the

CONCLUSION

The petition for a writ of certiorari should be denied.

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two-year statute of limitations, compel a finding that nothing KPMG did caused petitioner to suffer any of its alleged losses. Petitioner claims that it suffered losses because it continued to make direct placement investments as a result of KPMG's alleged failure to report that investments in petitioner's portfolio had suffered permanent impairment in the amount of $35 million as of June 30, 1988. The district court found, and the Eighth Circuit affirmed, however, that the undisputed facts show that petitioner was on notice of the purported fraud with respect to those investments in December 1986 and took no action. (R. 878 (granting summary judgment to all defendants except Michael Russell and KPMG), p. 51); *see also KPERS VI*, 114 F.3d at 689-90. The district court also found, and the Eighth Circuit affirmed, that the undisputed facts show that petitioner had knowledge of at least $51 million of permanent impairment in its private placement investment portfolio by September 1989, yet it took no action to stop its direct placement investments. (R. 896 (granting summary judgment to KPMG), pp. 12-13); *see also KPERS VI*, 114 F.3d at 692 (recognizing that successor auditor indicated that impaired investments could be as high as $75 million). Although neither the district court nor the Eighth Circuit needed to reach that alternative ground for summary judgment, the undisputed facts show that the causal connection alleged by petitioner did not exist.

Respectfully submitted,

WILLIAM F. LLOYD
JEFFREY R. TONE
NANCY A. TEMPLE
HILLE R. SHEPPARD
SIDLEY & AUSTIN
Bank One Plaza
10 South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

DONALD W. ROSE
Associate General Counsel
KPMG LLP
280 Park Avenue
New York, New York 10017
(212) 909-5412

CARTER G. PHILLIPS *
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Respondents
KPMG Peat Marwick LLP and Robert W.L. Spence

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* Counsel of Record